

Before the  
**Federal Communications Commission**  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

**In the Matter of**

**Children's Television Obligations of  
Digital Television Broadcasters**

**MM Docket No. 00-167**

**REPLY COMMENTS OF THE  
ASSOCIATION OF LOCAL  
TELEVISION STATIONS, INC.**

The Association of Local Television Stations, Inc. (ALTV), hereby files the following *Reply Comments* in the above captioned proceeding. As we observed in our initial *Comments*, it is premature to enact intrusive regulations on digital television broadcasters. Imposing burdens such as those found in the *Notice* and in some comments, would stifle innovation and make it more difficult for local stations to serve their audience. Moreover, such regulations raise significant statutory as well as First Amendment concerns. If the FCC is truly concerned about providing children's core programming in the digital world, then it should take all the necessary steps to insure that broadcasters are able to roll out digital services as rapidly as possible. Before you can have core digital children's programs, you must have digital television.

# **I. THERE IS NO JUSTIFICATION FOR IMPOSING ADDITIONAL REGULATIONS ON DIGITAL TELEVISION BROADCASTERS.**

## **A. The Market Should Be Given a Chance to Develop Before Imposing Any Regulations.**

It appears that all sides of this debate agree that the digital television market is still in its nascent stage. Both FCC Commissioner Michael Powell and Commissioner Harold Furchtgott-Roth made this point quite clear in their separate statements to the *Notice of Proposed Rule Making*.<sup>1</sup> Similar sentiments were expressed by a majority of the parties filing in this proceeding.<sup>2</sup> Ironically even those seeking additional regulations recognized this fact. When rejecting immediate implementation of the “pay or play” proposal, Children Now stated:

Consideration of “pay or play” necessarily raises intricate questions concerning the structure of the broadcasting market, market incentives, and the relative positions of the market’s players, and Children Now believes that the optimal time for a renewed “pay or play” inquiry would be *within a year or two after the digital era has more fully unfolded, and the realities of its marketplace therefore are better known*.<sup>3</sup> (Emphasis supplied)

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<sup>1</sup>Separate Statements of the Honorable Michael Powell and the Honorable Harold Furchtgott-Roth to the *Notice of Proposed Rule Making* in MM Docket No. 00-167, FCC 00-344 (October 5, 2000).

<sup>2</sup>See e.g., *Comments of ALTV* at 3-4, *Comments of Maranth Broadcasting Company* at 3, *Comments of National Broadcasting Company* at 2, *Comments of Sinclair Broadcast Group* at 1, *Comments of the National Association of Broadcasters* at 3, *Comments of Viacom* at 2,

<sup>3</sup>*Comments of Children Now* at 29.

Of course Children Now goes on to suggest further regulations.<sup>4</sup> Nonetheless, it agrees with the basic premise underpinning the broadcast industry's opposition to additional digital children's regulations. The digital television marketplace is in its infant stage. No one knows with any certainty how this market will develop. It is too early to regulate.

The approach taken by the FCC's *Notice* and by the proponents of regulation stands in stark contrast to the broadcast industry. Proponents of regulation believe additional burdens are justified simply because digital *may* offer an opportunity to provide different services than analog television. We submit that regulations cannot be imposed simply because the *possibility* exists that new technology may provide new service to children. Regulation must be based on some evidence of a market failure to provide such services.

Regardless of the proponent's "good" intentions, the "wish list" approach is fraught with peril. It requires a level of prescience generally not found in the human condition. Children Now's original proportional technology proposal illustrates the danger of this approach. Initially it proposed a proportional technology rule where, if 20% of all non-core programming was broadcast in HDTV, 20% of all core children's programs would have to be broadcast in HDTV.

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<sup>4</sup>Indeed, Children Now never explains why it is premature to enact one type of regulations -- "pay or play" -- but not its own burdensome programming proposal. Other than expressing its "wish list" there is little or no analysis presented here. Children Now cannot have it both ways. If it is premature to impose some regulations because of market uncertainty, then this condition would apply to Children Now's proposals as well.

While it sounded like a good idea to Children Now at the time of its initial filing, the organization conferred with a focus group, and has now changed its mind.<sup>5</sup>

Unfortunately, this entire proceeding is filled with a virtual cornucopia of ideas as to how digital broadcasting *should* operate. What is lacking, of course, is any realistic notion of how digital broadcasting *will* operate. Like Children Now's proportional technology proposal, it may turn out to be unnecessary or even harmful to serving children in the digital world. The proponent's additional children's regulations are asking the government to craft a set of regulations governing a market and a technology that are in their nascent stages of development. Given the current paucity of digital television receivers in the market, those calling for increased children's regulation are effectively trying to regulate the unborn.

#### **B. Broadcasters Are Providing Sufficient Amounts of Core Children's Programming**

It is arbitrary to adopt regulations to solve problems that do not exist.<sup>6</sup> Basic administrative law, not to mention principles of sound public policy, dictate that the presumption should be against enacting new, burdensome rules until the digital broadcast marketplace has had a chance to develop. Those seeking to impose a new regulatory regime onto digital broadcast television bear a significant burden to demonstrate that such regulations are needed.

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<sup>5</sup>*Comments of Children Now* at 16.

<sup>6</sup>*Home Box Office Inc., vs. FCC*, 567 F.2d 9,36 (D.C. Cir 1977) (A regulation perfectly reasonable in one set of circumstances is highly capricious if the problem no longer exists).

Proponents of additional children's regulations have failed to meet this burden. None of the parties proposing an expansion of the existing regulatory regime cite to any evidence demonstrating a need for additional regulations. For example, Children Now speak to the need to "seize the historic opportunity which digital television presents" and to protect children from "*potential abuses*" of the new technology.<sup>7</sup> The Center for Media Education wants additional regulations to "capitalize on the enhanced capabilities of DTV." It states further that "These new capabilities raise various *possibilities* for DTV broadcasters to create new, lucrative revenue streams."<sup>8</sup> None of these statements articulate a need for regulation. Regulations cannot be justified on the speculative grounds that there may be "*new opportunities*" or the "*possibility*" that there may be new revenue streams.<sup>9</sup>

The expansion of children's regulations can not be justified as a *quid pro quo* for receiving additional spectrum.<sup>10</sup> As our initial comments observed, television broadcasters did not receive a permanent allocation of additional spectrum. The digital channels received by

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<sup>7</sup>*Comments of Children Now* at 3.

<sup>8</sup>*CME Comments* at 3, 4.

<sup>9</sup>In this regard it is worth remembering that even the Advisory Committee could not justify regulations simply because there was a possibility of a new revenue stream for broadcasters. To the contrary the Advisory Committee observed that such regulations should attach only if the grant results in enhanced economic benefit. *See* ALTV comments at 4 (citing *Advisory Committee Report* at 55.) Given the present state of the digital roll out, most broadcasters are years away from seeing any enhanced economic benefits from digital television. To the contrary, the transition to digital will be extremely costly and there are no guarantees of additional revenues.

<sup>10</sup>*See e.g., Comments of Children Now* at 4.

broadcasters are to replace the analog channels that will eventually be returned to the government.<sup>11</sup> There is no spectrum windfall. Local television stations started the process with 6 Mhz of spectrum and they will finish the process with 6 Mhz of spectrum.<sup>12</sup>

Significantly, none of the proponents of additional children's programming regulation cite to a market failure for core educational programs. As most commenters observed, there is no evidence in this record demonstrating that commercial television stations have failed to meet the directives and requirements of the Children's Television Act or the three hour guidelines established by the Commission.<sup>13</sup> To the contrary, proponents of new rules, such as CME, simply assert that "three hours per station is not enough programming to satisfy the programming needs of all age groups."<sup>14</sup> However, no analysis is presented as to what "not enough" core children's programming means. Is there an actual shortage of such programming? Are children being harmed by the lack of such programming? It would appear that the proponents of

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<sup>11</sup>Unfortunately, the governments failure to enact digital must carry rules has delayed the transition.

<sup>12</sup>Local television stations will occupy two 6 Mhz channels during the transition. As recent history demonstrates, however, this is anything but a windfall for local television stations. Every day new television digital television stations are being built. Broadcasters have done their part to meet the build out requirements. Unfortunately, there are few, if any, receivers in the marketplace that are capable of receiving an over-the-air digital television signal. Even some of the most powerful television station groups in the country have failed to secure digital cable carriage through the retransmission consent process. At this stage, it is simply wrong to classify the second digital channel as a revenue enhancement.

<sup>13</sup>See e.g., *Comments of NAB, Comments of State Broadcasters*.

<sup>14</sup>*Comments of CME* at 7.

regulation simply want more programming because “more is always better.” There is no consideration of the costs involved, or whether additional core programs are needed. We urge the FCC to reject this veiled attempt to re-open the entire quantitative children’s debate.

CME’s desire to re-open the children’s rules is evident from its criticism of current broadcaster performance. First, it argues that only seven percent of core programming was targeted at preschoolers. This claim is based on a survey of core programming airing on commercial stations in the Philadelphia market. Unfortunately the sample size of the study makes its findings somewhat limited.<sup>15</sup> Moreover, some programs that may have been targeted towards both pre-school and elementary school age children were reclassified to apply only to school age children.<sup>16</sup> Because of the reclassification, programs that apply to preschoolers were reclassified, thereby reducing the number of programs in the pre-school category. Significantly,

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<sup>15</sup>The study examined only three episodes of each of the 41 core programs broadcast by Philadelphia commercial stations. Even the study’s author was concerned about its small sample size.

An assessment of intercoder reliability was obtained using Holsti’s formula. Though this formula is sometime criticized for not accounting for agreement that would occur by chance, the more rigorous Krippendorff’s alpha *could not be used due to the small size of the sample and the bivariate nature of many of the variables.*

Amy B. Jordan, *“Is the Three Hour Rule Living up to Its Potential,”* Annenberg Public Policy Center, June 26, 2000 at 16 n. 16 (hereinafter cited as *Jordan Study*)

<sup>16</sup>According to the referenced study, “Four programs spanned two age groupings (e.g. targeted to both preschoolers and elementary school age children). They were reclassified based on the air time (e.g., if it was on during school hours it was targeted as a preschool program) and content (e.g. if the content dealt with school-related themes it was reclassified as an elementary school age program.” *Jordan Study* at 17 n. 17.

the study never counted programs that were aired by public television stations. In commenting on the alleged small percentage of pre-school programs, the study observed, "These age trends are consistent with previous years, and perhaps understandable given the preponderance of preschool programs on PBS [and] cable..."<sup>17</sup> Finally, and perhaps most importantly, there is nothing in the FCC's current regulatory regime that would require a station to broadcast to a specific children's sub-group.<sup>18</sup>

CME's next criticism is that the programs tend to focus on social and emotional needs rather than teaching academic subjects.<sup>19</sup> It is not obvious that this is a valid criticism. Programming to the emotional and social needs of children is extremely important in our society. Both the Congress and the FCC recognized that programming to these needs is important. In fact, recent surveys have found that parents believe such programming to be educational.

Mothers were also asked what they considered to be valuable or enriching programming for their children. Similar to the children, mothers' definitions of educational programming was quite broad. They indicated that even though shows with intentional social or academic lessons were clearly educational,

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<sup>17</sup>*Jordan Study* at 26.

<sup>18</sup>In a similar argument, CME argued that there is evidence that programs are targeted to boys more than girls. *CME Comments* at 7. Of course the Commission has never imposed a requirement that a certain amount of programming must be directed at boys or girls. Such a rule would constitute a tremendous intrusion into the editorial discretion of broadcasters and create nightmares for the FCC. It is impossible to develop criteria to determine what constitutes "girls programming" as opposed to "boy's programming" for pre-school children.

<sup>19</sup>*CME Comments* at 7



programs which don't intend to teach, but might show children what they should *not* do, were also educational.<sup>20</sup>

Without becoming too philosophical, the core educational needs of a child would seem to extend beyond learning multiplication tables. The criticism is inherently subjective.

Teaching about emotional and social issues is an academic exercise. Entire academic disciplines such as psychology, sociology and communications studies are centered on these issues. Finally, the assertion regarding the lack of academic programs is simply incorrect.

According to Jordan's analysis,

The predominant lessons were of a social/emotional nature; for example lessons about sharing, time management, self-respect and acceptance of diversity. Nearly half (45 percent) of the episodes were coded as containing pro-social themes. Lessons centering on traditionally academic subjects were also quite common -- 41 percent of the evaluated episodes contained lessons about science, animal behavior, history and other school-related subjects.<sup>21</sup>

Even this analysis underestimates the absolute amount of academic oriented programming that appears on commercial television. As Jordan noted, the emerging networks and traditional independent stations were "significantly more likely to offer traditionally academic programs...."<sup>22</sup> Moreover, "[m]oderately educational and highly educational programs

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<sup>20</sup>Kelly Schmidt, *Public Policy, Family Rules and Children's Media Use in the Home*, Annenberg Public Policy Center, June 2000 at 15.

<sup>21</sup>*Jordan Study* at 18.

<sup>22</sup>*Id.* Indeed, according to Jordan, "[T]he majority of programs on smaller networks and independents come from syndication and are traditionally academic. This trend has been consistent since the first season under the Three Hour Rule." *Id.* at 26.

are more likely to air multiple times in a week, while minimally educational programs are generally confined to a single time slot.”<sup>23</sup>

Finally, CME criticizes the industry for not providing core programs with a local or community focus. Of course, prior to the three hour rule, many local stations were providing locally produced core educational programs. Unfortunately, the three hour rule has lead to a decline in locally produced core children’s programming. As Jordan observed,

“Though there are no programs produced and aired by the local broadcast stations (referred to as local programs), this is not unusual as the prevalence of local programming has been on the decline since the introduction of the Three-Hour Rule....”<sup>24</sup>

On balance, none of the proponents of regulation provide any evidence that there has been a failure to provide core educational programs to children. The opposite is true. According to the Annenberg Policy Center, “[T]he APPC analyses reveal that most broadcasters have made a significant effort to improve the quantity and availability of educational programming for children.”<sup>25</sup>

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<sup>23</sup>*Id.* at 24.

<sup>24</sup>*Id.* at 7.

<sup>25</sup>*Id.* at 29.

### **C. The Digital Marketplace Will Provide Greater Incentives to Broadcast Core Children's Programs.**

Not only are current levels of core programming more than adequate, but there is absolutely no evidence to indicate that such programming will be found wanting in the digital world. As we noted in our initial comments, the ability to multi-cast will create the economic engine to target specific audiences, like children.<sup>26</sup> The market based concerns that purportedly justify a rule in the analog environment, will not exist in the digital world. Even Children Now recognizes that the economics of the digital world will be different.

Broadcasters may find, for example, that they need no longer choose between targeting an adult audience, a "general" children's audience, or a children's audience falling within a specific age range for a given time slot. Indeed, broadcasters may even find it increasingly advantageous to appeal to small niche groups as the possibilities for marketing to more general audience become exhausted.<sup>27</sup>

While acknowledging the fundamental change that will occur in the digital broadcast marketplace, proponents of regulation justify their policies on the need to have a base line in case the market does not work. This belt and suspenders approach to policy should be rejected. In the absence of any evidence of a market failure, the FCC should refrain from extending these rules at this time.

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<sup>26</sup>*ALTV Comments* at 7-8.

<sup>27</sup>*Children Now Comments* at 5 n. 7.

## **II. ADDITIONAL REGULATORY BURDENS SHOULD BE REJECTED**

At the outset, it is important to recognize that the proposals proffered by CME, Children Now and the Children's Workshop go far beyond the existing regulatory structure. This is not a question of simply applying the current three hour programming requirement to a single, free over-the-air digital channel. To the contrary, each proposal would significantly increase a television station's programming obligations. We urge the FCC to reject these proposals.

### **A. CME's Point System Proposal Should Not Be Adopted.**

We urge the FCC to reject CME's proposed point system. While any point system has the veneer of being "objective" it's nothing more than a subjective exercise. For example, the number of points that would be necessary to avoid staff review at renewal time is a purely subjective evaluation. Is twenty points the proper threshold? How about five points or perhaps ten?

A second layer of arbitrary subjectivity involves the assignment of point values for each item. For example, under the proposal a station would receive two points for an extra half hour of core programming, and three points if it was locally produced or contained an interactive element.<sup>28</sup>

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<sup>28</sup>*CME Comments* at 13.

While the FCC may have employed point systems in other contexts, the plan proposed by CME involves program content. For example, the plan specifically favors a certain type of EI programming over another. EI programs with an interactive component or that are locally oriented are worth more than traditional EI programs. Apart from the fact that there is no rationale for drawing such a distinction, such an approach may go beyond simply fostering a children's program. It involves the FCC in a level of specificity that infringes on First Amendment imperatives.

Another problem with CME's approach is that it amounts to nothing more than a tax on a certain segment of the video industry. As structured, broadcasters that may be unable to provide the additional EI program, would be forced to provide 0.1% of their annual gross revenues to local public television stations or to schools for data casting services. In either instance the FCC is imposing a specific tax on a specific segment of the video industry. Imposing such a content based, specialized tax on one segment of the video industry is inherently suspect under the First Amendment.<sup>29</sup>

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<sup>29</sup>See *Leathers v. Medlock*, 111 S.Ct. 1438 (1991); *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983). Of course the Children's Television Act permits consideration of voluntary, non-broadcast activities, including the funding of children's programs on other stations. However, CME's proposal could force a station to contribute specified amounts of revenue in order to obtain renewal. Such an approach is vastly different than the current regulatory regime and amounts to a specific, targeted tax.

## **B. Children Now's Proportional Programming and Proportional Technical Proposals Not Be Enacted. .**

In our initial comments ALTV opposed Children Now's proportional programming rule. As most commenters to this proceeding have observed, there is no factual justification for increasing the core children's programming obligations of digital television stations.<sup>30</sup> Indeed, as NAB observed, this proposal is not based on a finding that children's needs have not been met. Rather it is based merely on Children Now's perception of how new technology should function, as opposed to a real demonstration of need. Absent a finding that children's needs are not being met with the current requirement, there is no justification for increasing these obligations in the digital world.

As part of its proposal, Children Now suggests that "the overall program hours to be counted in calculating each broadcaster's 3% obligation should include subscription and pay programming as well as all free programming."<sup>31</sup> Thus, while Children Now would only require free channels to actually broadcast the additional core educational core programs, it would count all channels, including pay channels, when calculating the basic three percent obligation.

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<sup>30</sup>As our comments noted, this proposal could have the effect to increasing the hourly children's programming obligation four or five fold. This increase would occur even though, after the transition, local television stations would be using the same amount of spectrum 6 Mhz as they presently occupy. There is no spectrum windfall. *See ALTV Comments* at 20.

<sup>31</sup>*Comments of Children Now* at 6 n. 9.

ALTV opposes this approach. Pay or subscription based services should not be used to determine the percentage of core educational programming to be broadcast on digital television stations. First, such a requirement violates §336(a)(3) which instructs the Commission to apply regulations to ancillary services “as are applicable to analogous services provided by other persons.” No other pay or subscription service has an obligation to provide core children’s programming.<sup>32</sup> Moreover, no other multichannel provider is subject to additional programming obligations based on the amount of programming that appears on one of its pay channels.

A second concern is that the plan creates all the wrong incentives. As Children Now readily admits, “[T]hose broadcasters with an abundance of programming hours will acquire a proportionally greater share of core programming responsibility, while those broadcasters who program fewer hours than their colleagues will acquire a proportionally smaller share of core programming responsibility.”<sup>33</sup> In other words, those television stations that decide to devote more of their DTV capacity to the provision of free over-the-air television (or any video), will become subject to greater regulatory burdens. Such a policy may create an incentive to have local stations avoid video programming as much as possible.<sup>34</sup>

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<sup>32</sup>As we understand the proposal, Children Now would not require an ancillary or pay service to actually broadcast additional core programs. However, these services would be “counted” in calculating the amount of core children’s that must be broadcast on the non-pay, or free channels.

<sup>33</sup>*Comments of Children Now* at 10.

<sup>34</sup>Whether or not the plan imposes a significant burden will depend on whether there are independent market incentives for the provision of core children’s educational programming. ALTV believes that such incentives may exist, thereby negating the need for the imposition of

Recognizing this possibility, Children Now adds an additional regulatory burden. Under its proposal, a separate three percent children's requirement would exist for any datacasting or interactive service transmitted independent of video programming. "[This] would act primarily as a safeguard in the case that a significant amount of channel space is dedicate solely to datacasting or similar services." As noted above however, FCC rules governing ancillary services such a datacasting, must be analogous to the rules that govern like services. ALTV is unaware of any children's content requirements that are applied to wire-line or wireless data services. Accordingly, the FCC is prohibited by §336(a)(3) from enacting this proposal.

We do agree with Children Now that broadcasters should have the flexibility to air core educational programming on a single channel. In a multicast world, it makes little sense to force children's core educational programming on an "all news" channel. Nonetheless, we disagree with Chiildren Now that broadcasters should not have the option to meet their children's program requirements with non programming alternatives. The Children's Television Act expressly permits the Commission to consider non-broadcast efforts in making licensing decisions. Children Nows plan would take this option away from local stations and make a minimum program obligation as the only means through which a licensee can meet the requirements of the Children's Television Act. Eliminating the non-broadcast option is in direct conflict with §303(b)(1)(2) of the Children's Television Act and should be rejected.

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additional regulations. Nonetheless, to the extent the provision of core educational programs impose costs, the proposal will create incentives to avoid video programming options.



### **C. The Three Percent Interactive Rule Should Be Rejected.**

ALTV is happy to see that Children Now has abandoned its plan to require each broadcaster to provide proportional technical quality for core educational and all non-core programming.<sup>35</sup> Under its original plan, if 20% of all non-core programming was broadcast in high definition, then 20% of all core educational programming would have had to be broadcast in high definition.

Unfortunately, Children Now's latest idea suffers from similar problems. It has now decided that interactivity is the key issue, and proposes that the same percentage of core programming include an interactive component as non-core programming.<sup>36</sup> It is simply too early in the process to require such a draconian rule. There has been no analysis of the costs involved or even if such interactivity will be available on core educational shows. For example, what happens if the producers of a core educational program simply do not produce a show with interactive links? Does this mean a station would not be able to broadcast the show because it would jeopardize the station's proportional interactive numbers? Such a requirement is difficult to explain given the position by some in this proceeding that links to websites during children's programs should be prohibited. As Children Now discovered with its initial proportional technical proposal, perhaps it would be best to wait until the market evolves before adopting rules forcing technology that is not yet on the market.

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<sup>35</sup>*Comments of Children Now* at 16.

<sup>36</sup>*Id.*

#### **D. The Definition of Commercial Matter Should Not Be Changed**

With the exception of CME, most parties filing comments on this issue agree with ALTV, that the definition of what constitutes commercial matter in the context of children's programming should not be changed. Even Children Now does not support changing the definition of commercial matter.

As we observed in our initial comments, the Children's Television Act specifically exempted certain kinds of promotional spots and public service announcements from the definition of commercial matter. Accordingly, the FCC's ability to revise the definition is constrained by the 1990 Children's Television Act and its legislative history.<sup>37</sup> For the same reasons these interruptions were originally excluded from the commercial matter rule, they should remain excluded from the category of commercial matter: they are either not paid for and therefore do not fall within the definition of commercial matter directed to be adopted by the Children's Television Act, or they should be encouraged to be broadcast (*i.e.*, PSAs) by not being subjected to commercial limits.<sup>38</sup>

As a matter of policy, redefining PSAs and program promotions as commercial matter is contrary to the public interest. Public service announcements benefit children. Indeed the FCC

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<sup>37</sup>*Comments of Named State Broadcasters Associations* at 16.

<sup>38</sup>*Report and Order*, In the Matter of Policies and Rules Concerning Children's Television Programming, MM Docket No. 90-570, 6 FCC Rcd 2111 - 2112, 2115 (1991).

has noted the value of this type of short segment programming.<sup>39</sup> Also, program promotions, especially for children's and other socially responsible non-core programming benefits children. Finally, if the proponents of regulation are correct, and there is a faltering market for children's programming, then why would the FCC want to enact a rules that make it more difficult, from a financial standpoint, to air core children's programs. This proposal is simply counter productive.

#### **E. The FCC Should Not Adopt Regulations Governing Website Access**

ALTV recognizes that this proceeding has engendered some interesting debate regarding website links during children's programs. At this point, however, it should remain just that -- debate. It is too early in the process to enact any rules governing this issue.

As many commenters point out, children would benefit from links to other children's websites. In this regard, ALTV does not believe the FCC should limit such links simply to non-commercial websites. Such a distinction would make no sense for commercial broadcasters. Indeed, the very core programming that would be connected to the website is itself, commercially produced programming. The stated objective of the FCC's children's television policy has been to provide incentives to create core educational programming in a commercial marketplace. Accordingly, we agree with Viacom that so long as the website contains editorial content, there should be no restrictions on linking a website to a core children's educational

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<sup>39</sup>*See Comments of Viacom* at 36-38

program.<sup>40</sup> We stress however, that it is simply too soon to even contemplate regulations in this area.

#### **F. Product Placement Rules and Ratings for Commercials Should Be Rejected**

We stated in our initial comments that there was no need to adopt product placement requirements for television broadcasters. As the FTC noted in its Report, the industries are voluntarily addressing this issue. As MPAA noted, companies are taking voluntary actions to address concerns about marketing motion pictures. These MPAA companies agreed to:

- Review their marketing and advertising practices in order to further the goal of not inappropriately specifically targeting children in advertising of films rated R for violence, and
- Appoint a senior executive compliance officer or committee to review on a regular basis the company's marketing practices in order to facilitate the implementation of the initiatives.<sup>41</sup>

As the FTC noted when it declined to issue specific regulations in this matter, regulating in this area raises significant constitutional issues. Commercial advertising is protected speech, and attempts to regulate it have come under increasing judicial scrutiny.<sup>42</sup> These concerns are exacerbated by the government's attempt to discern which advertisements are "unsuitable" for children.

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<sup>40</sup>*See Comments of Viacom* at 33.

<sup>41</sup>*Comments of the Motion Picture Association of America* at 18.

<sup>42</sup>*See Comments of MPAA* at 7; *Comments of Association of National Advertisers* at 8.

It appears that FCC lacks the authority to enact regulations regarding product placement of advertising. The liaison agreement between the FCC and the FTC states that the FTC will exercise primary jurisdiction over all matters regulating unfair or deceptive advertising in all media, including the broadcast media.<sup>43</sup>

Finally, the 1996 Telecommunications Act does give the FCC authority to enact a ratings system for advertisements or require V-chip coding. Pursuant to Section 551, the FCC role was limited to determining whether an industry-adopted ratings system was satisfactory. Once it made this determination, its role in the creation of a ratings system -- including ratings for advertising -- ended<sup>44</sup>. Moreover, there is nothing in Section 551 of the 1996 Telecommunications Act which gives the FCC any authority over advertising. To the contrary, any FCC activity appears to be limited to the approval of a ratings system for "video programming" and not advertising.

#### **G. There Is No Need for New Preemption Rules**

ALTV does not believe the FCC needs to adopt additional preemption rules for digital television. As the industry commenters observed, stations are managing preemptions in the analog world so as to avoid significant disruptions in the scheduling of children's core

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<sup>43</sup>*Comments of the Association of National Advertisers* at 5.

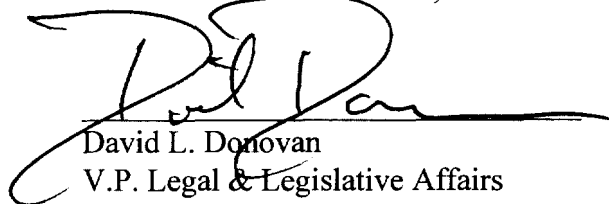
<sup>44</sup>*See Comments of NAB* at 26.

programming.<sup>45</sup> As we noted in our initial comments, there may be no need for such regulations in the digital world. At this point in time, the FCC should be cautious. Once the digital marketplace has begun the function, the FCC may want to revisit this issue. However, any action now would be premature. Finally, the current news exemption for late breaking news should remain in place.<sup>46</sup>

### III. CONCLUSION

ALTV continues to believe that it is premature to extend any of the children's television requirements to digital television at this time. Attempts to extend these rules, indeed to increase the burdens, are not justified based on the factual record before the Commission. The digital free, over-the-air television service is in its nascent stage. We believe the FCC's time would be better spent enacting rules -- like digital must-carry -- which would help accelerate the deployment of the service, before imposing new regulations.

Respectfully submitted  
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<sup>45</sup>See e.g. *Comments of NBC* at 6.

<sup>46</sup>See *Comments of NAB* at 27.